



REPUBLIC OF SOUTH AFRICA

Not reportable
Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: JR 806/13

In the matter between:

CHARLES ODENDAAL

Applicant

and

CCMA

First Respondent

L SHEAR N.O.

Second Respondent

MIDVAAL LOCAL MUNICIPALITY

Third Respondent

T PEETERS

Fourth Respondent

Heard: 3 June 2015

Delivered: 18 June 2015

Summary: Review – failure to renew fixed term contract of employment –
LRA s 186(1)(b) – employee not dismissed.

JUDGMENT

STEENKAMP J

Introduction

- [1] The applicant, Mr Charles Odendaal, was employed by the third respondent, Midvaal Local Municipality, on a fixed term contract and on terms governed by s 57 of the Local Government: Municipal Systems Act.¹ His contract of employment included the following clauses:

“This contract of employment may be renewed by agreement at the end of the fixed term for a further term or terms on the same conditions or any other conditions that the parties may agree upon.

It is expressly agreed that any renewals of this contract will not create any expectations or rights to further renewals in the future, neither will the employee acquire any right to permanent employment if this contract is not renewed by the employer.”

- [2] The Municipality did not renew the contract. Odendaal claimed that he had been unfairly dismissed. He referred an unfair dismissal dispute to the CCMA (the first respondent). Conciliation was unsuccessful. He referred the dispute to arbitration, claiming that the failure to renew his contract constituted a dismissal in terms of s 186(1)(b) of the Labour Relations Act.² The arbitrator (the second respondent) disagreed. He found that Odendaal had not been dismissed. Odendaal seeks to review that award.

Background facts

- [3] Odendaal was employed as Executive Director: Support Services. It is common cause that this is a senior position governed by s 57 of the Systems Act.
- [4] During 2006 and 2006 the Municipal Manager, Mr BJ Poggenpoel, told the municipal heads of department, when they inquired about the possibility of the renewal of their contracts of employment when they came to an end in February 2008, that the Municipality had not taken a decision.

¹ Act 32 of 2000 (the Systems Act).

² Act 66 of 1995 (the LRA).

[5] Poggenpoel stated:

“Die vaste termyn kontrakte van die Munisipale Bestuurder en Hoofde van Departemente sou verstryk op 29 Februarie 2008.

Vanaf ongeveer September 2006 het ek met die burgemeesterskomitee onderhandel om genoemde kontrakte te hernu of ten minste ‘n aanduiding te gee watter kontrakte hernu gaan word en watter nie ten einde die posbekteërs in staat te stel om indien nodig, vroegtydig ander heenkome te vind. Tot by my uitdienstrede in Julie 2007 kon ek nie hierin slag nie en het ek die Hoofde van Departemente voortdurend aangemoedig om hul werk so te doen dat niks in die werkgewer se weg sou staan om hul kontrakte te hernu nie.”

[6] About a week before a Council meeting in August 2007 the Executive Mayor, Ms Martie Wenger, told the applicant and other heads of department that their contracts would expire on 28 February 2008; that those positions would be advertised; and that they were encouraged to apply. Odendaal applied and was interviewed for the position of Executive Director: Corporate Services. He was unsuccessful. He had obtained a mark of 65% in the interview and the successful applicant, Mr T Peeters (the fourth respondent), got 75%.

[7] In December 2007 the parties entered into a written agreement incorporating the following terms:

“The parties hereto agree that said [sic] contract of employment dated 1 April 2002 has not been renewed and as a result thereof agreed that Odendaal is henceforth relieved of his obligations in terms of the said contract which terminates on 28 February 2008.

Odendaal agrees to all conditions of this agreement and agrees that he has no further claim against the Midvaal Local Municipality.”

[8] Odendaal nevertheless referred an unfair dismissal dispute to the CCMA when his application for the post was unsuccessful.

The arbitration award

[9] The arbitrator found that the applicant had not been dismissed.

[10] The arbitrator concluded that the applicant did not have a reasonable expectation to have his contract renewed based on criteria that would justify it. He found that, at best, the applicant had a subjective belief that he would be reappointed. The mere fact that the applicant scored 92% in his annual performance appraisal, he said, merely qualified him for a bonus. It was irrelevant to his score during the interview. It might be a factor, but it is only one of several factors. And the fact that the mayor had invited candidates to apply could never have been an assurance that could guarantee reappointment. The arbitrator concluded:

“There is nothing before me to suggest that the interview process was not conducted fairly or lawfully, or that the successful candidate, Mr Peeters, was not the correct appointee. To all intent and purpose, a proper procedure was followed in terms of the respondent’s policies and the Municipal Systems Act. There is therefore nothing to suggest that the applicant’s failure to be appointed was anything but reasonable or rational. I can find no basis to conclude that the failure to reappoint him constituted an unfair dismissal.”

Review grounds

[11] The applicant raised a number of grounds of review, some of which were not applicable. Mr *Van Jaarsveld*, for the applicant, submitted lengthy argument on the law of unfair dismissal and the constitutional right not to be subjected to unfair labour practices.³ But the principles relating to unfair dismissal, trite as they are, only come into play once the employee has shown that he has been dismissed. Cases such as this one, where the employee claims that the non-renewal of his contract constitutes a dismissal, are governed by s 186(1)(b) of the LRA. If the employee cannot show that he was dismissed, fairness doesn’t come into it. In this case, the employee didn’t pass the first hurdle. The arbitrator found that he had not been dismissed. The only question before the Court is whether that conclusion is reviewable.

³ Constitution of the Republic of South Africa s 23(1).

Applicable law

[12] That question must be assessed against the applicable legal principles.

Review: the applicable test

[13] Both parties approached the review application by applying the review test as set out in *Sidumo*⁴ and *Herholdt*⁵, i.e. whether the arbitrator's conclusion was so unreasonable that no other arbitrator could have come to the same conclusion. I disagree. The question is whether the employee was dismissed. That is a jurisdictional question. The test to be applied is whether the arbitrator was right or wrong in concluding that Odendaal was not dismissed.⁶

Section 57 of the Systems Act

[14] This section reads:

“Employment contracts for municipal managers and managers directly accountable to municipal managers

57. (1) A person to be appointed as the municipal manager of a municipality, and a person to be appointed as a manager directly accountable to the municipal manager, may

be appointed to that position only—

(a) in terms of a written employment contract with the municipality complying with the provisions of this section; and

(b) subject to a separate performance agreement concluded annually as provided for in subsection (2).

(2) The performance agreement referred to in subsection (1) must --

(a) be concluded within a reasonable time after a person has been appointed as the municipal manager or as a manager directly accountable to the municipal manager and thereafter within one month after the beginning of the financial year of the municipality;

⁴ *Sidumo v Rustenburg Platinum Mines Ltd* (2007) 28 ILJ 2405 (CC).

⁵ *Herholdt v Nedbank Ltd* (2013) 34 ILJ 2795 (SCA).

⁶ *SARPA v SA Rugby (Pty) Ltd* (2008) 29 ILJ 2218 (LAC); *Asara Wine Estate & Hotel (Pty) Ltd v Van Rooyen* (2012) 33 ILJ 363 (LC).

...; and

(c) in the case of a manager directly accountable to the municipal manager, be entered into with the municipal manager.

(3) The employment contract referred to in subsection (1)(a) must include, subject to applicable labour legislation, details of duties, remuneration, benefits and other terms and conditions of employment.

(4) The performance agreement referred to in subsection (1)(b) must include—

(a) performance objectives and targets that must be met, and the time frames within which those performance objectives and targets must be met;

(b) standards and procedures for evaluating performance and intervals for evaluation; and

(c) the consequences of substandard performance.

(5) The performance objectives and targets referred to in subsection (4)(a) must be practical, measurable and based on the key performance indicators set out from time to time in the municipality's integrated development plan.

(6) The employment contract for a municipal manager must—

(a) be for a fixed term of employment not exceeding a period ending two years after the election of the next council of the municipality;

(b) include a provision for cancellation of the contract in the case of non-compliance with the employment contract or, where applicable, the performance agreement;

(c) stipulate the terms of the renewal of the employment contract, but only by agreement between the parties; and

(d) reflect the values and principles referred to in section 50, the Code of Conduct set out in Schedule 2, and the management standards and practices contained in section 51.

(7) A municipality may extend the application of subsection (6) to any manager directly accountable to the municipal manager.”

[15] The applicant did have a fixed term contract of employment and a performance agreement in terms of s 57 of the Systems Act. The terms of renewal at the discretion of the Municipality were those set out in clause 2.2 of the contract of employment. It is common cause that he performed as well as the other heads of department in terms of the performance agreement; but he did not fare well in the interview for the advertised post.

Section 186(1)(b) of the LRA

[16] This section reads:

- “ (1) “Dismissal” means that—
- (a) ...;
 - (b) an employee reasonably expected the employer to renew a fixed term contract of employment on the same or similar terms but the employer offered to renew it on less favourable terms, or did not renew it;”

[17] The question on review is whether the arbitrator correctly found that Odendaal did not have a reasonable expectation of renewal.

Evaluation

[18] The arbitrator found that Odendaal may have had a subjective expectation that his contract would be renewed, but objectively, that was not a reasonable expectation.

[19] That conclusion is not reviewable. The contract of employment made it clear that the contract may be renewed, i.e. that the Municipality retained a discretion to renew it or not. The Executive mayor told Odendaal and others in August 2007, six months before the expiry of their fixed term contracts, that the contracts would expire at the end of February and that they would have to apply for the advertised posts. Odendaal fared badly in the interview process when measured against the incumbent. Peeters. And the arbitrator’s finding that it was the performance in the interview, rather than during the previous year, that was used by the Municipality in order to decide on appointments, is also consistent with the evidence before him.

[20] The applicant's counsel submitted that Odendaal's "perception" and "understanding" was that he had an expectation of renewal. That in itself is indicative of the subjective nature of that understanding. The arbitrator found that such an expectation was not objectively reasonable. That conclusion was, in my view, not only reasonable, but correct.

Conclusion

[21] The arbitration award is not reviewable. With regard to costs, I take into account that the applicant was unsuccessful and that there is no longer any relationship between the parties. And both parties asked that costs should follow the result. I agree.

Order

The application for review is dismissed with costs.

Steenkamp J

APPEARANCES

APPLICANT: S R van Jaarsveld
Instructed by Riki Anderson, Pretoria.

THIRD RESPONDENT: A N Snider
Instructed by Cliffe Dekker Hofmeyr Inc,
Johannesburg.